



SWOT ANALYSIS OF ARBITRATION AWARDS IN INDIAN CONSTRUCTION CONTRACTS

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ABSTRACT

Contract forms, terms, specification, analysis of rate and conditions of contract are being followed by various governments departments in the field of civil construction are not uniform. Against the backdrop of India's burgeoning macro-economic prospects, the weaknesses of the construction industry create challenges, particularly with respect to settlement of disputes between the owner and contractor that it will have to overcome. Arbitration awards have been studied and based upon their analyses a series of survey questionnaire have been developed. The responses to the above along with the gist of focused discussions and interviews with domain experts forms the basis for SWOT analyses of arbitration awards.

Key words: Indian Construction, Construction Industry, Construction Contracts

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1. INTRODUCTION

The construction industry is generally acknowledged as the world's most litigious industry. The forefront of creation & implementation of cutting edge new techniques duly backed by continuous innovation, for preventing, containing controlling & amicably resolving disputes for many years. Construction industry, with the backward & forward linkages with various other industries cement, steel, brick, etc. catalyses employment generation & in fact in the second largest employer, next to agriculture only. Half of the planned expenditure is spent on construction & infrastructure. The construction industry is very labour intensive & has generated employment for 33 million people & has contributed about 8.5% to country's GDP in financial year 2008-09. Experts & professionals in the field hold the view that disputes if not attended to, when it requires so, has a spiralling effect in terms of not only finance but also, personnel, time, opportunity cost the visible costs being the incurred towards, advocates & attorneys, the arbitration process itself and less visible costs comprise, resources of the parties assigned to the dispute, lost business opportunities and damage for business relationship.

With the onset of rapid globalization of the economy, increase in the no. of commercial disputes, has far outstripped the rate growth of the dispute redressed & resolution mechanisms. Increased case load on the overburdened courts has resulted in a very slow adjudication of commercial disputes. The present arbitration system in India is still plagued with many shortcoming & still very short of it developing into a quick & cost effective mechanism for resolution of construction disputes. Claim & disputes for redresses & settlement arise owing to differences on the issues of owner caused disruption & delays, enforcement of liquidated damages, interpretation of site instructions, increase in scope of the work vis-à-vis those covered by the contract being integral to the project work spelt out in the contract, differing site condition & ambiguous/ defective specification.

2. LITERATURE REVIEW

2.1. Features of the arbitration and construction act, 1996

Effectiveness of the 1996 Act

The 1940 Act was repealed by the promulgation of the 1996 act and one of the prime motives was to provide an expeditious dispute resolution mechanism with a view of inspiring confidence in the Indian dispute resolution system and with a further view to reassuring the international Investors in the reliability of the Indian legal system.

Changes brought by the 1996 Act

Drastic changes were ushered in by the 1996 act. In the absence of case laws and general understanding of the act in the context of arbitration, several provisions of the 1996 Act were brought before the courts which interpreted the provisions in the usual manner. This was inevitability as the act was promulgated by an ordinance and later passed without widespread debate.

2.2. Challenge to awards or ground for setting aside domestic awards

Part 1 of the 1996 act is modelled on the UNCITRAL Model Law (6) and the UNCITRAL Arbitration Rules (7) with few departures. The relevant provisions are briefly outlined below.

- Section 13 of the 1996 act, corresponding to Art 13 of the model law provides for challenge to an arbitrator on the ground of lack of independence or impartially or lack of qualification. In the first instance, a challenge is to be made before the arbitral tribunal itself.

- If the challenge is rejected, the tribunal shall continue with the arbitral proceeding and make an award.
- Section 13(5) of the 1996 Act provides that where the tribunal overrules a challenge the arbitration, the party challenging the arbitrator may make an application for setting aside the arbitral award under s 34 of the 1996 Act (corresponding to Art 34 of the model law). Hence, approach to a court is only at the post-award stage. This is departure from the model law which provides for an approach to the court within 30 days of the arbitral tribunal rejecting the challenging.
- The second departure from the Model Law (relevant to enforcement) is to be found in S. 16 of the 1996 Act (corresponding to art 16 of the Model law).
- Section 16 incorporates the competence-competence principal and enables the arbitral tribunal to rule on its jurisdiction, including with respect to the existence or validity of the arbitration agreement it shall continue with the arbitral proceeding and make an award.
- Section 16(6) of the 1996 act provides that a party aggrieved by such award may make an application for setting aside the same in accordance with S. 34. Article 16 of the model law in contrast, provides that where the arbitral tribunal overrules any objection to its jurisdiction, the party aggrieved with such decision may approach the court for resolution within 30 days.

2.3. Practice and process of arbitration in the construction industry

2.3.1. Standard contract followed by central and state governments

The rights, obligations, privies including provision for dispute resolution are formally written. Instrumentalities of the states as well as private corporations and different departments have their own standard terms of contract catering to their respective needs and the documents provide for remedial measures to address various contingencies. Disputes and differences often arise in spite of existence of extensive and time tested contracts. Provisions for settling all disputes arising from the contract save a few “expected matters” also figure in the documents.

2.3.2. Unique features of arbitration

Arbitration clause are provided to include within its purview all disputes relating to the transaction but exemption or exclusion clauses also exist to facilities making the decision, final and binding on the parties because in construction contracts situation arise for which immediate decision on a point of differences or dispute is required to avoid costly delays.

2.3.3. Requirements of an arbitration agreement

Written agreement

Section 7(4) provides for an arbitration agreement to be in writing if it is contained in an exchange of letter, telex, telegram or other means of telecommunications, providing a record of agreement and an exchange of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Issues in arbitration agreement

Clarity must be the prime concern regarding applicable law for arbitration, location of arbitration, number of arbitration, language of arbitration, discovery procedure, limitation to arbitration powers, interim measures/provisional remedies, privacy, rules applicable, appeal & enforcement, local peculiarities and survival after termination of the main agreement.

2.4. Major findings of some Empirical studies

Form some empirical studies of the construction arbitration process (though none studied the decision itself) findings include negative experiences of arbitration users with the process and the lack of consistency in the quality of decision makers (Stipanowich 1987: Thomson 1994: stipanowich 1996)

As in litigation, the parties in arbitration give up control over the decision and have to proceed in an adversarial forum, endangering future relationship. The perception, if not the reality in every case, is that Arbitration has advantages over litigation, of lower cost, more prompt resolution and finality (Richard H Steen).

2.5. Finding on causes of delay for projects in other countries

Ogunalana & promkuntong (1996) summarized the causes of delay in construction project in Thailand, Bangkok and segregated the same in areas of problems of shortages and inadequacies in industry infrastructure (mainly supply of resources), problems caused by clients and consultants and problems caused by contractor incompetence/inadequacy.

Mezher and Tawil (1998) found that, (1) delays are more concerned with financial issues in case of owners, (2) contractors considered contractual relationship as most important and the consultants considered project issues to be responsible for delays.

2.6. SWOT matrix model

SWOT analysis is a subjective analysis of data organized by the SWOT format into a logical order that helps understanding, presentation, discussion and decision making of arbitration awards was carried out keeping in mind the following matrix depicted in table1.

Table 1 SWOT matrix model

	Positive/helpful to achieve the goal	Negative/harmful to achieve the goal
Internal Origin Facts/factors of the issue	Strengths Things that are good now, maintain them, build on them and use as leverage	Weaknesses Things that are bad now, remedy, change or stop them
External Origin Facts of the environment in which the issue exist	Opportunities Things that are good for the future, prioritize them, capture them, build on them and optimize	Threats Things that are bad for the future, put in plans to manage them or counter them

3. RESEARCH METHODOLOGY

The methodology adopted for the present research is to seek response to the structured questionnaire from arbitrators, professionals, contractors and owners followed by conducting SWOT analysis after studying the different legislations including the provisions of the Arbitration and Conciliation Act 1996 which govern the arbitration process in Indian construction contract with study of the exigencies, where Arbitration go ahead with pronouncing the Awards in the absence of evidence and in contravention to established and promulgated various Laws and Acts and provision of the contract that govern the process of

Arbitration. The data collected through questionnaires were analysed for relative importance index (RII), severity index (SI), frequency index (FI), risk index (RI) and overall index (OI).

3.1. Questionnaire survey

Based on the gist of analysis of acts, arbitration awards and court judgements a set of survey questionnaire was formulated which is given below.

3.2. Introduction to the questionnaire

The process of conducting Arbitration followed by pronouncement of Arbitration awards (Domestic) in construction contracts have under gone steady evolution and refinement over the years. This could be possible on account of continuous changes brought in the construction contract documents being followed by various Government Departments on one hand and on account of the Arbitration Act 1940 by the more comprehensive and precise Arbitration and Conciliation Act 1996.

Many of the arbitration awards get either completely set aside by the Courts or get modified to the extent that the Arbitration process itself starts appearing to be anfractuous in hindsight. The present questionnaire comprises broadly three sections viz a) The reasons primarily responsible for creation of dispute, b) Difficulty encountered in analysis of the issues preceding pronouncing of Arbitration Award by Arbitrators and c) Reasons adduced by Courts in course of setting aside/ modification of Arbitration Awards. The ultimate goal of the present Questionnaire is to identify the reasons that lead to challenging/ setting aside of an Arbitration Award.

3.2. Questionnaire survey and analysis of the responses received

Based on the gist of the court case judgements, delivered by the Apex court and High Courts in construction arbitration cases, Arbitration Awards and related Acts and Laws, a set of structured questionnaire was framed. Separate set of questions were required to be answered by Owners, Contractors, Professionals and Arbitrators. The Questionnaire set as sent is reproduced as underneath. Profile of Respondents: Owners- 58%, Contractors-8.5%, Arbitrators – 25% and advocates 8.5%.

Further, Arbitrators are unanimous in their view that the time required for the procedure to conclude and pronounce. An award normally takes 36 months or more. Comparing the above views, it is seen from the result of the Arbitration cases that in only 33% of the Arbitration cases (studied for the thesis) the disputed claimed amount exceeded Rs. 10 Lakhs and majority of these cases pertained to Highway Project.

4. ANALYSIS OF DATA

4.1. Relative importance index

Based on response taken through questionnaire from 275 respondents, the response of effect for each delay factor were categorised as “very little”, “little”, “average”, “high” and “very high”. The scoring weightage for these effects were taken as 1, 2, 3, 4, and 5 respectively. Then using the formula of RII, the value of RII of each delay factor was computed.

4.2. Frequency index

Through the questionnaire, response from 275 respondents was taken. The response of effect for each delay factor was categorised as “rarely”, “sometimes”, “often”, and “always”. The scoring weightage for these effects were taken as 1, 2, 3, 4, and 5 respectively. Then using the formula of frequency index, the value of FI of each delay factor was computed.

4.3. Severity Index

From the data, the response of degree of severity for each delay factor was categorised as “little”, “moderate”, “great”, and “extreme”. The scoring weightage for these effects were taken as 1, 2, 3, 4, and 5 respectively. Then using the formula of Severity index, the value of SI of each delay factor was computed.

4.4. Importance Index

After finding out the frequency index and severity index for each delay factor, the IMP I was calculated by multiplying these parameters.

4.5. Overall Index

After determination of relative index, frequency index, severity index and risk index, the overall index (OI) was calculated for each factor.

Table 1.3 Details of delay factors and different indexes

Groups	Cause of Delay	RII	FI	SI	RI	OI
Constraints identified leading to a dispute Parameter considered	Delay in handing over of site	69.02	64.00	74.00	47.36	63.59
	Delay in decision of employer	64.58	60.09	70.82	42.56	59.51
	Delay in payment	70.40	55.73	66.36	36.98	57.37
	Delay on account of subsequent change in drawings	61.02	61.73	65.55	40.46	57.19
	Ambiguous and mutually contradictory contract provisions	67.27	57.82	53.64	31.01	52.43
	Improper deductions in payment on a/c of post contract legislations/guidelines	63.64	68.09	79.09	53.85	66.17
	Change in scope of work	65.89	67.64	69.64	47.10	62.57
	Unrealistic time of completion/extension of time/penalty on contractor	67.35	61.55	76.73	47.22	63.21
	Delay in payment on account of inadequate flow of funds	67.85	68.64	72.00	49.42	64.48
	Delay in procurement of critical materials by contractor	72.29	74.82	76.55	57.27	70.23
	Conflict in perception of Architect and Designer	70.40	52.18	73.82	38.52	58.73
	Difference of opinion on rate of extra/non schedule/market rated items between contractor and owner	72.44	68.00	75.36	51.25	66.76
Constraints to be identified by Arbitrators in course of conducting arbitration and Pronouncing Awards Parameter	Delay in submission of statements of facts by the Claimants	76.22	69.91	70.09	49.00	66.30
	Delay in submission of counter statements of facts and counter claims by Respondents	60.51	60.18	76.00	45.74	60.61
	Seeking unreasonable adjournments in hearings by parties	65.75	69.00	71.36	49.24	63.84
	Difficulty in establishing authenticity of documents as	76.07	61.82	78.00	48.22	66.03

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Groups	Cause of Delay	RII	FI	SI	RI	OI
considered	evidence					
	Citation of cases wherein mutually contradictory Judgments have been delivered on the identical dispute scenario by quotes.	75.20	69.64	77.45	53.94	69.06
	Non-availability of cited critical documents having tremendous bearing on the overall quantum of claim	70.25	67.45	73.82	49.79	65.33
	Apportioning reasons for delay between client and contractor	64.65	69.36	68.27	47.36	62.41
	Silence of contract provisions on critical issues (viz) award of interest etc. and the like.	65.96	66.00	72.18	47.64	62.95
To be answered by Arbitrators only	Percentage of the award amount to the claimed amount is normally 50%	74.98	59.64	74.36	44.35	63.33
	Arbitration has advantages over litigation of lower CAT & Prompt resolution.	64.58	65.09	68.73	44.74	60.78
	Do delay in decision process by owner to requests of contractor lead to disputes	69.75	57.55	73.09	42.06	60.61
	Do improper claim management by contractors lead to lesser award them they are entitled to	69.82	65.82	69.91	46.01	62.89
	Do you have to go for guesstimates to fill in the gaps while deciding on damages	69.24	70.55	75.91	53.55	67.31
	Has your impartiality been questioned by the parties during the arbitration process	68.73	60.09	74.55	44.80	62.04
To be answered by Owners & Contractors only	Arbitration awards if not in favour invariably requires to be challenged in court	68.36	78.45	72.09	56.56	68.87
	District Court's Judgment if not in favour requires to be challenged in High Courts (by way of challenging Disst. Court's Judgment).	70.69	80.73	75.64	61.06	72.03
	High Court's judgment if not in favour requires to be challenged in Supreme Court (by way of challenging High Court's Judgment).	59.42	50.27	73.09	36.74	54.88
	One should opt for out Court settlement instead of going in for litigation even if it is slightly disadvantageous	64.29	54.00	75.09	40.55	58.48
To be answered by Owners,	Pronouncing awards without the claimant substantiating the	69.53	64.36	66.27	42.66	60.70

Groups	Cause of Delay	RII	FI	SI	RI	OI
Contractors and Legal Professionals. Reasons for moving court beyond Arbitration stages. Rank the below given reasons in order of the importance of the reason in deciding for going in to litigation.	claim leading to unfair award					
	Arbitrators settle claims by contravening settled law position	68.95	68.91	52.18	35.96	56.50
	Simply, because the award is in favour of the other party	69.16	55.91	66.09	36.95	57.03
	Moving Court is an option	72.15	56.55	69.64	39.38	59.43
	Delay appoint in of Arbitrator	64.95	55.91	74.18	41.47	59.13
	Arbitrator ignores relevant documentary evidence in settling claims	61.31	61.55	56.45	34.75	53.51
	Implausible interpretation of Contractor clause leading to wrong award.	67.42	59.91	85.64	51.30	66.07
	Arbitrator going beyond jurisdiction	76.65	56.09	63.27	35.49	57.88
	Arbitrator being biased	65.75	65.82	75.64	49.78	64.25
	Awarding unreasonable interest rates	56.00	53.27	80.45	42.86	58.15

5. SWOT ANALYSIS OF ARBITRATION AWARDS

5.1. Strength

- The awards in general were reasoned ones owing to which the parties could be aware about the working of the mind of the arbitrator.
- None of the awards suffered from the issue of the party (s) having not been provided equal and sufficient opportunity to present their cases.
- In most of the awards, the interpretation of the contract provisions was strictly followed by the arbitrator and on this count they never trespassed their jurisdiction.
- None of the awards, studied for the thesis suffered from the charge of the Arbitrator being biased.

5.2. Weakness

- As arbitration is an informal process, the decision of one Arbitral Tribunal is not binding on other tribunals in similar cases but only have persuasive value.
- There is no set time limit within which the Arbitral tribunal need essentially pronounce the awards.
- The arbitrator cannot be compelled to give reasons for his decisions, and in such cases the court has no right to probe the mental process of the arbitrator.

5.3. Opportunity

- It is an interpretation of a contract or any clause there in by arbitrator, is supposed to be binding on the courts, which is a higher authority, then it should be binding on other arbitrators dealing with the same clause agreement also.
- The arbitrator must prepare as list of all the documents presented before him and make sure that all the documents are served on the parties and append such list to the award.

- The reference letter to the arbitrator must contain a provision for reduction of professional fees in case of exceeding the set time limit.

5.4. Threat

- Future legislation can also pose a threat, this may render the arbitration process, redundant.
- Long proceedings time involve larger number of hearings, increased routine expenditure and longer time for which the money gets locked.
- Increased judicial intervention riding on the back of the shortcomings of the arbitration awards is likely and may strike at the very roots of the arbitration process.

6. CONCLUSION

Efficacy of an arbitration award begins with an ideal agreement. There must have instances, wherein while preparing copies of the contract documents, some important lines in critical clause provisions goes either missing or gets inadvertently omitted. As any award is pronounced keeping in view contract provision, factual background leading to the dispute and law precedents laid down by courts on identical disputes. Hence, existence of disputes in construction contracts cannot be wished away completely.

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